

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MICHELE RICCI,

Plaintiff,

VS.

AETNA, INC., D/B/A

AETNA U.S. HEALTHCARE AND

AETNA LIFE INSURANCE COMPANY,

Defendants.

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CIVIL ACTION

NO. 02-CV-4330

**PLAINTIFF'S RESPONSE TO DEFENDANT, AETNA, INC., D/B/A AETNA U.S.
HEALTHCARE AND AETNA LIFE INSURANCE COMPANY'S MOTION TO AMEND
THIS COURT'S MARCH 12, 2003 INTERLOCUTORY ORDER TO CERTIFY PURSUANT
TO 28 U. S. C. § 1292 (b)**

Admitted with clarification. Plaintiff, Michele Ricci, by and through her counsel, admits that the Court's Order of March 12, 2003 should be amended to certify the case for appeal, for the reasons set forth in Defendant, Aetna, Inc., d/b/a Aetna U.S. Healthcare and Aetna Life Insurance Company's Memorandum of Law attached to its Motion, and the reasons set forth in Plaintiff's accompanying Memorandum of Law which is incorporated herein by reference as if the same were set forth herein at length.

WHEREFORE, Plaintiff, Michele Ricci, requests this Court to enter the Order proposed by Defendant, Aetna, and to grant such other relief as the Court deems just and appropriate.

RESPECTFULLY SUBMITTED:

M. MARK MENDEL, LTD.

BY:

**THEODORE A. SCHWARTZ, ESQUIRE
KENNETH B. GREAR, ESQUIRE
1620 Locust Street
Philadelphia, PA 19103-6392
Attorneys for Plaintiff**

DATE: _____

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**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE
TO DEFENDANT, AETNA, INC., D/B/A AETNA U.S. HEALTHCARE AND AETNA LIFE
INSURANCE COMPANY'S MOTION TO AMEND THIS COURT'S MARCH 12, 2003
INTERLOCUTORY ORDER AND TO CERTIFY PURSUANT TO 28 U. S. C. § 1292 (b)**

I. FACTS/LEGAL ARGUMENT

The facts relevant to Defendant, Aetna's Motion and this response are adequately set forth in Defendant, Aetna's Motion and do not need to be repeated here. However, since the filing of Defendant's Motion, both counsel for Defendant, Aetna, and the Plaintiff have discovered that there are no cases pending before the Court of Appeals for the Third Circuit on the issue of ERISA Preemption of Bad Faith Claims and further the only case at the trial court level is in the Eastern District of Pennsylvania and that involves the case of Rosenbaum v. Unum Life Insurance Co., 2002 WL 1769899 (E.D. Pa. July 29, 2002). It has come to Plaintiff's counsel's attention that after discussion with Plaintiff's counsel in the Rosenbaum matter, there is a Motion for Reconsideration on Judge Newcomer's original Opinion pending before Judge Newcomer. Plaintiffs' counsel have been informed that it is very unlikely that any appeal will occur if the Judge rules in favor of the Defendant because unlike the present case, Rosenbaum involves two insurance policies, one which

is governed by ERISA and involves the preemption issue and the other which is a private insurance policy in which the Bad Faith claim is not being contested. Therefore, it appears as if the present case is the only matter that exists in the Third Circuit at least at the Trial Court level in the Eastern District of Pennsylvania where the issue of ERISA preemption of Bad Faith claims is ripe for appellate review. Finally, the test used to determine whether or not a particular state law “regulates insurance” so as to be saved from ERISA preemption, commonly known as the McCarran-Ferguson factors, has been rejected by the Supreme Court of the United States in the case of Kentucky Association of Health Plans, Inc. v. Miller, 536 U.S. 956, 122 S. Ct. 2657 (April 2, 2003) and replaced with a two (2) part test to determine whether or not a state law is saved from preemption under ERISA. A true and correct copy of this Opinion is attached hereto, made part hereof and marked as Exhibit “A”.

Although the Plaintiff by and through her counsel are in disagreement with Defendant Aetna’s position on the applicability of the Rosenbaum v. Unum Life Insurance Company Opinion authored by the Honorable Clarence C. Newcomer, it is this very disagreement as well as for the reasons set forth above, that the Plaintiff is not disputing Defendant Aetna’s attempt to have this Court amend the Interlocutory Order entered on March 12, 2003 to certify this case pursuant to 28 U.S.C. § 1292 (b) to the Court of Appeals for the Third Circuit for review since the March 12, 2003 Order involves a controlling question of law as to which there are substantial grounds for a difference of opinion and that an immediate appeal from that Order may materially advance the ultimate termination of this litigation.

II. CONCLUSION

Therefore, for all of the foregoing reasons, Plaintiff, Michele Ricci, requests this Honorable Court to enter a proposed Order attached to Defendant, Aetna's Motion to amend and to grant such

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other relief as the Court deems just and appropriate.

M. MARK MENDEL, LTD.

BY:

**THEODORE A. SCHWARTZ, ESQUIRE
KENNETH B. GREAR, ESQUIRE
1620 Locust Street
Philadelphia, PA 19103-6392
Attorneys for Plaintiff**

DATE: _____

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CERTIFICATION OF SERVICE

I, Kenneth B. Gear, Esquire, hereby certify that a true and correct copy of Plaintiff, Michele Ricci's Response and Memorandum of Law in Support thereof to Defendant, Aetna, Inc., d/b/a Aetna U. S. Healthcare and Aetna Insurance Company's Motion to Amend the Interlocutory Order of March 12, 2003 to certify for appeal pursuant to 28 U.S.C. § 1292 (b), was filed with the Court and mailed on May 15, 2003 by United States Postal Service, First Class Mail, Postage Prepaid to counsel for Defendant as follows:

Patricia C. Collins, Esquire
Elliott, Reihner, Siedzikowski & Egan, P.C.
Union Meeting Corporate Center V
P.O. Box 3010
925 Harvest Drive
Blue Bell, PA 19422

M. MARK MENDEL, LTD.

BY:

**THEODORE A. SCHWARTZ, ESQUIRE
KENNETH B. GREAR, ESQUIRE
1620 Locust Street
Philadelphia, PA 19103-6392
Attorneys for Plaintiff**

DATE: _____